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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. **434**

UNIVERSAL TRADES, INC.,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal from the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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IN THE

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OCTOBER TERM, 1958

No.

UNIVERSAL TRADES, INC.,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

Appeal from the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

Appellant, Universal Trades, Inc., appeals from the judgment of the Supreme Court of Pennsylvania, entered on May 23, 1958, sustaining the capital stock tax (a property tax) by Pennsylvania, the domiciliary state, on the same property incidents of appellant's intangible assets that were taxed by Florida, the State of business situs and commercial domicile; and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

A. OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is reported in 392 Pa. 323, 141 A. 2d 204 (March 17, 1958), and is printed in Appendix B hereto. The state court therein, on the bare basis that Pennsylvania is the chartering state and by application of the domiciliary situs rule (mobilia sequuntur personam), sustained the tax and rejected appellant's contention that such tax on the same property incidents of appellant's intangible assets that were subjected to valid property taxation by Florida, the State of business situs and commercial domicile, violated Due Process.

The opinion of the trial court, Common Pleas of Dauphin County, Pennsylvania, dated August 5, 1955, is reported in 68 Dauphin 139; and the opinion of that court en banc, sur exceptions filed, has not been reported. Both opinions are included at pages 34a and 51a of the printed Pennsylvania Supreme Court Record (hereinafter referred to as "R") filed herewith.

B. JURISDICTION.

The grounds, including the essential facts, on which the jurisdiction of this Court is invoked are:

(i) This action was brought by appellant, a Pennsylvania corporation, under Section 1104 of the Fiscal Code of Pennsylvania, 72 Purdon's Statutes, § 1104, as an appeal from capital stock tax imposed on domestic corporations under Sections 20 and 21 (a) of the Pennsylvania Act of June 1, 1889, P. L. 420, as amended, 72 Purdon's Statutes, §§ 1901 and 1871, to challenge, inter alia, the power and jurisdiction of the domiciliary state to impose such tax on the same property incident of appellant's intangible assets that were subjected to valid property taxation by Florida, the State of business situs and commercial domicile. The nature of the Pennsylvania tax is

not at issue and is conceded to be a property tax (Appendix B, p. 28 and R. 31a).

(ii) The judgment of the Supreme Court of Pennsylvania was entered March 17, 1958, but did not become final for purpose of this appeal until May 23, 1958, when appellant's Petition for Reargument was denied. (Appendix C. p. 50). Notice of appeal was filed on August 12, 1958, in the Supreme Court of Pennsylvania.

(iii) The statutory provisions conferring jurisdiction of the appeal on the Supreme Court of the United States are to be found in 28 U. S. C. §§ 1257 (2) and (3) and 2103.

(iv) The following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment on appeal in this case:

Question 1.

Newark Fire Insurance Co. v. State Board of Tax Appeals, 307 U. S. 313, 59 S. Ct. 918 (1939) (Majority view on multiple taxation of intangibles by domiciliary and business situs states).

Curry v. McCanless, 307 U. S. 357, 59 S. Ct. 900 (1939) (Majority view on multiple taxation of intangibles by domiciliary and business situs states).

Graves v. Schmidlapp, 315 U. S. 657, 62 S. Ct. 870 (1942).

State Tax Commission of Utah v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008 (1942).

Greenough v. Tax Assessors of Newport, 331 U. S. 486, 67 S. Ct. 1400 (1947).

Commonwealth v. Stewart, 338 Pa. 9, 12 A. 2d 444 (1940) affirmed *Stewart v. Pennsylvania.* 312 U. S. 649, 61 S. Ct. 445.

Question 2.

Newark Fire Insurance Co. v. State Board of Tax Appeals, 307 U. S. 313, 59 S. Ct. 918 (1939).

Question 3.

New Orleans v. Stempel, 175 U. S. 309, 20 S. Ct. 110 (1899).

Liverpool & London & Globe Insurance Co. v. Board of Assessors, 221 U. S. 346, 31 S. Ct. 550 (1911).

Wheeling Steel Corporation v. Fox, 298 U. S. 193, 56 S. Ct. 773 (1936).

First Bank Stock Corporation v. Minnesota, 301 U. S. 234 57 S. Ct. 677 (1937).

Smith v. Ajax Pipe Line Co., 87 F. 2d 567 (1937); affirmed 300 U. S. 677, 57 S. Ct. 669.

State Statute Involved.

(v) The validity of the following Pennsylvania statute, as construed by the Supreme Court of Pennsylvania, is involved: Act of June 1, 1889, P. L. 420, Section 20 as amended by the Act of May 16, 1945, P.L. 606 and Section 21 (a) as amended by the Act of May 29, 1951, P. L. 462, 72 Purdon's Statutes, §§ 1871 and 1901. The text of the pertinent provisions of said sections is set forth verbatim in Appendix A.

C. QUESTIONS PRESENTED.

1. Does property taxation by Pennsylvania, on the bare basis that it is the chartering state, of the same property incidents of appellant's intangible assets that are subjected to valid property taxation by Florida, the state of commercial domicile and business situs, violate due process?

2. Is it the duty of this court to examine the evidence to determine the correctness of appellant's conclusions as to the establishment of commercial domicile and business situs in Florida where its assertion of a Federal right under due process is based upon such conclusions?

3. Did appellant establish a commercial domicile for itself and a business situs for its intangible assets in Florida so as to support valid property taxation of such assets by that state?

D. STATEMENT OF THE CASE.

(1) The Statute; Nature of Tax; and Tax Formula.

Section 20 of the Act of 1889, as amended, requires domestic corporations to file annual tax reports and Section 21 (a), as amended, imposes tax on "the actual value in cash" of their capital stock. This value is based upon the statutory tests of average selling price of shares on the market, earnings and dividends, and actual value of assets considering indebtedness, which tests have been extended by judicial construction to include all factors having any bearing on value.[1] The state court has uniformly construed the statute as imposing a tax on property and assets[2] —exempt assets such as United States securities[3] and property located or having a legal situs outside of the state,[4] not being subject to the tax. In *Commonwealth v. Semet-Solvay,* 262 Pa. 234, 105 A. 92 (1918) and in other cases not cited, the state court, in the case of a Pennsylvania corporation conducting its business operations within and without the state, has also construed the statute as imposing tax upon the intangible assets of the corporation which had acquired a business situs outside of the state.

The formula to be used in computing capital stock tax liability is specifically provided by statute;[5] taxable assets over total assets times actual value in cash of the whole capital stock. In the instant case, the numerator of the asset ratio is comprised entirely of appellant's cash on

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[1] *Com. v. Pennsylvania Railroad Co.,* 297 Pa. 308, 147 A. 242 (1929).

[2] See Opinion in instant case, Appendix B., p. 28 and cases cited there and approval of 4th Request for Conclusions of Law. (R. 31a).

[3] *Com. v. Lehigh Coal & Navigation Co.,* 162 Pa. 603, 613, 29 A. 664 (1894). *Com. v. Lackawanna Iron & Coal Co.,* 129 Pa. 346, 356, 18 A. 133 (1889).

[4] *Delaware, Lackawanna* and *Western Railroad Co. v. Penna.,* 198 U. S. 341, 25 S. Ct. 669 (1905).

[5] Act of June 22, 1931, P. L. 685, 72 Purdon's Statutes, §§ 1896.

hand and in banks, and accounts receivable (R. 10a), which were also subjected to property taxation by the State of Florida. (R. 9a).

(2) History of the Case.

Appellant was incorporated under the laws of Pennsylvania on August 27, 1951 for the purpose of "general contracting; construction, buying, selling * * * and otherwise dealing in buildings, installations, ships, machinery, * * * machinery parts and machinery supplies" (R. 7a).

From its inception through the tax year involved (fiscal year ended June 30, 1953), appellant has maintained its registered office at Ambridge, Pennsylvania, and its principal office at Green Cove Springs, Florida. It has never carried on any activities or conducted any business in or with any person residing in, Pennsylvania (R. 7a, 8a, 9a).

At and from its Florida office, appellant has exercised complete jurisdiction, control, supervision and management of its assets and business—executive and administrative functions; negotiations of contracts for work to be done; stockholders' and directors' meetings; books of account and records; investments; invoices; collections and deposits; and disbursements. Its work, directed, supervised, managed and controlled, at and from its Florida office, consists of painting, repairing and making various installations on ships belonging to the United States government in Puerto Rico and the British West Indies, where some disbursements are made (R. 7a, 8a, 9a).

During the year involved, appellant owned tangible property in the amount of $266,614.26, consisting of office furniture in Florida and machinery, equipment, fixtures and work in progress outside the continental limits of the United States; and it owned intangible assets in the amount of $271,052.92, consisting of cash ($98,527.36) and special deposits ($5,233.00) in Florida banks, accounts receivable ($156,054.17) and advances to individuals ($11,238.39), on its books of account in Florida (R. 9a).

For the year involved, the State of Florida imposed its Intangible Property Tax on these intangible assets of appellant which it paid (R. 9a). Likewise, the Commonwealth of Pennsylvania, in its capital stock or property tax assessment made against appellant for the same year, *excluded therefrom appellant's tangible property* and imposed tax solely and exclusively on its same intangible assets which had been taxed by Florida (R. 10a, 11a). There is no basis for the statement of the Supreme Court of Pennsylvania in its Opinion (Appendix B, pp. 22, 28), that the Pennsylvania tax assessment is based only in part upon appellant's intangible assets.

Appellant protested the Pennsylvania tax on the grounds: (1) that it had established a commercial domicile and its intangible assets had acquired a business situs, in Florida; (2) that on the basis thereof, the property tax imposed by Florida on its intangible assets was valid; and (3) that the Pennsylvania property tax on the same property incidents of the same intangible assets, on the bare basis that it is the chartering state, violates Due Process.

The state court, in complete disregard of evidence establishing business situs and commercial domicile and without making any finding of facts or conclusions of law in respect thereto or as to how their establishment would affect Pennsylvania's power and jurisdiction to tax, applied the domiciliary situs rule of taxation and upheld the validity of the Pennsylvania tax. Its position is that its decisions and those of this Court support this result. Appellant's position is that the Pennsylvania decisions relied upon by the state court are in error and that the decisions of this Court, approved by a majority thereof, may be distinguished and do not support the state court's result but do support appellant's position and contentions. Appellant's Petition for Reargument, refused by the state court, summarizes its contentions and reasons in support of its position and is printed in Appendix C at pp. 36-50.

(3) How the Federal Questions Were Raised.

The issues of commercial domicile and business situs, of the duty of the courts to make findings of fact and conclusions of law in respect thereto, and of the violation by the Pennsylvania tax of Due Process, under the circumstances, are interrelated and raise Federal Questions. These issues were raised from the inception of litigation in the instant case.

(a) Commercial Domicile and Business Situs.

Their affirmative existence was raised in paragraph 7 c, d and e of appellant's Appeal and Specification of Objections (R. 5a); in its 2nd and 3rd Requests for Conclusions of Law (R. 29a) and in its 1st, 2nd and 3rd Supplemental Requests for Conclusions of Law (R. 31a), which were refused by the lower state court; in its 4th, 5th, 10th and 11th Exceptions (R. 45a, 46a) which were overruled by the lower state court (R. 51a); in its First Question to the Supreme Court of Pennsylvania—"Did appellant, a Pennsylvania corporation, establish a commercial domicile, and did its intangible assets acquire a business situs in Florida, so as to support valid property taxation of its intangible assets by that State?"—which was not answered or discussed by that court (Opinion, Appendix B, p. 28); in its Petition for Reargument (Appendix C, pp. 36, 37-45), which was refused (Appendix C, p. 50).

(b) Duty of Courts to Examine Evidence and Make Findings Where Assertion of Federal Right of Due Process is Based Upon Commercial Domicile and Business Situs.

The lower state court, having affirmed appellant's Requests for Findings of Fact Nos. 1-13 inclusive (R. 24a-28a) from which no conclusion could be drawn except that appellant had established a commercial domicile and its intangible assets had acquired a business situs, in Florida,

refused to affirm appellant's 2nd and 3rd Requests for Conclusions of Law (R. 29a) and its 1st, 2nd and 3rd Supplemental Requests for Conclusions of Law (R. 31a), asking that court to so find, and that court overruled (R. 51a) its 4th, 5th, 10th and 11th Exceptions (R. 45a, 46a) to such refusals. In its "Statement of Matters" filed with the lower state court, pursuant to Rule 45 of the Supreme Court of Pennsylvania (R. 52a, 53a), in its Brief and Argument to the Supreme Court to Pennsylvania, and in its Petition for Reargument (Appendix C, pp. 45, 46), appellant raised this issue as to the duty of the courts to make such findings and to determine how such findings affected the asserted Federal right of Due Process, but the Supreme Court of Pennsylvania disregarded this issue completely and merely asserted affirmative conclusions, arguendo.

(c) Tax Assessment as violation of Due Process.

This issue was raised in Paragraph 7e of appellant's Appeal and Specification of Objections (R. 5a); in its 5th and 6th Supplemental Requests for Conclusions of Law (R. 31a, 32a) which were refused; in its 13th Exception (R. 47a) which was overruled (R. 51a); in its Second Question to the Supreme Court of Pennsylvania "* * * does property taxation of the same intangible assets by Pennsylvania, on the bare basis that it is the chartering state, violate Due Process?" * * * which was answered in the negative; and in its Petition for Reargument (Appendix C, pp. 37-45), which was refused (Appendix C, p. 50).

E. FEDERAL QUESTIONS ARE SUBSTANTIAL.

In complete disregard of evidence establishing, but assuming the establishment of, a commercial domicile by appellant and a business situs for its intangible assets, in Florida, the state court, on the bare basis that Pennsylvania is the chartering state, has upheld the validity of the Pennsylvania property tax on the *same* property incidents

of appellant's intangible assets that have been subjected to valid property taxation by Florida, the State of commercial domicile and business situs.

The lower state court found as a conclusion of law that appellant, "has never engaged in business in the Commonwealth of Pennsylvania" (R. 28a). It was not subject under the Corporate Net Income Tax Act of May 16, 1935, P. L. 208, as re-enacted and amended (72 Purdon's Statutes, §§ 3420a et seq.) to tax for the privilege of doing business in Pennsylvania because it had no net income which was assignable to Pennsylvania. It had a mere paper domicile in Pennsylvania. Its officers through whom it conducted its business operations were never physically present in Pennsylvania. Its intangible assets were not created, protected, or enforced under the laws of Pennsylvania.

Pennsylvania has exacted and collected from appellant a charge in the nature of Domestic Bonus (Called Domestic Excise Tax since 1953), 72 Purdon's Statutes, § 1822 *for the privilege of being a corporation,*[6] which is levied on authorized capital stock and increases thereof. It does not authorize or impose an annual franchise tax on appellant for the privilege "to be" a corporation measured by its entire capital stock regardless of whether it was doing business outside of the state, which it could have done by appropriate legislation.[7]

The modern view[8] of intangibles is that they are rights not related to physical things, but relationships between persons, natural or corporate, having attached thereto certain sanctions enforceable by the courts; and that they may give rise to separate rights, interests or relationships taxable in more than one state. In determining jurisdic-

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[6] *Com. v. Erie & Western Transportation Co.*, 107 Pa. 112, 56 A. 872 (1884).

[7] *Kansas City Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, 119, 37 S. Ct. 58 (1916).

[8] *Curry v. McCanless*, 307 U. S. 357, 365, 366, 59 S. Ct. 900 (1939).

tion of a state to tax intangibles, refinements based upon any theory of a fictional situs have been abrogated. Under the modern view, jurisdiction to tax must be based upon dominion over persons whose relationships are the source of the intangible rights or on benefit and protection conferred by the taxing sovereigns, or in other words, the jurisdiction of a state to tax must be based upon some reasonable connection or sufficient contact *with the subject matter* so that in some way it afforded protection to the intangible interest in question.

In the instant case, the state court sustains the jurisdiction of Pennsylvania to levy a property tax upon the *same property incidents* of appellant's intangible assets that are subjected to valid property taxation by the State of Florida on the sole and exclusive basis that Pennsylvania is the chartering state. It said in its Opinion (Appendix B, p. 28):

> "* * * Pennsylvania gives this domestic corporation its existence, its very life. It defines its powers; it gives it the right to make contracts, to sue and be sued, to increase or decrease its capital; it requires it to maintain a registered office in Pennsylvania where it must keep, inter alia, an original or duplicate record of the proceedings of the shareholders and of the directors, and the original or a copy of its by-laws. Pennsylvania statutory and decisional law define the nature and extent, and protect the interest of its shareholders. Why, under these facts, should Pennsylvania lose or abandon its right to impose an annual capital stock tax based in part upon the intangible property here involved?"

The subject matter and incidence of the tax at issue must be kept in mind. It is not a tax on the franchise or privilege "to be" a corporation or a transfer inheritance tax on shares requiring resort to the laws of the domiciliary state to effect transfer of the shares. Appellant is not physically present and does not carry on any activities in

Pennsylvania. Through the exercise of its secondary franchises completely beyond the borders of Pennsylvania, appellant's intangible assets or rights are not created, protected, enjoyed or enforced under the laws of Pennsylvania. Accordingly, the Pennsylvania tax is not based upon any relationship or intangible interest existing, exercised or enjoyed by appellant in Pennsylvania. Actually, the subject matter and incidence of the Pennsylvania tax are not different or separate but the *same* incidents of intangibles that are subjected to valid property taxation by Florida. If the bare fact that Pennsylvania is the chartering state is a sufficient basis to sustain Pennsylvania's jurisdiction to impose a property tax on appellant's intangible assets under the circumstances in the instant case, as held by the state court, *then any domiciliary state would have complete power and jurisdiction without limitation to levy a property tax on all property of corporations organized under its laws, tangible and intangible, without regard to location in, or valid taxation thereof by, another state.* Thus, it is quite apparent that the instant case presents to this Court for its consideration a substantial Federal question under Due Process.

(1) Property Taxation by Pennsylvania, on the Bare Basis that it is the chartering state, of the same property incidents of Appellant's Intangible Assets that are subjected to valid property taxation by Florida, the state of commercial domicile and business situs, violates due process.

For purposes of this proposition, it must be assumed, as did the state court, that appellant had established a commercial domicile for itself and a business situs for its intangible assets in Florida and that Florida had power and jurisdiction to levy a valid property tax on such intangibles.

Since, in determining the jurisdiction of a state to tax intangibles under the modern view, refinements based

upon any theory of a fictional situs have been abrogated (ante p. 11), the decisions of this Court based upon such refinements are not authorative and must be disregarded. For example, at one time, the state of incorporation was denied jurisdiction to tax.[9] At another time, the fiction developed that the situs of an intangible was the domicile of the debtor or obligor of the intangible.[10] Therefore, excerpts out of the contexts of such cases, and the decisions themselves, unless meeting the tests of the modern view or trend, are inapplicable. Nor are decisions of the Pennsylvania Courts controlling on the federal Due Process issue presented in the instant case.

The issue of whether both the domiciliary state and the business situs state have jurisdiction and power to levy a property tax on the *same* incidents of the *same* intangible assets has been reserved by this court and has not been decided.[11] In the *Newark Fire Insurance Co.* case and in *Curry v. McCanless,*[12] decided at the same Term, a majority of this Court rejected the doctrine of *Cream of Wheat v. Grand Forks*[13] which had held that "taxation of a corporation by the state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles." Since then, this issue and the similar issue in the instant case has not been decided definitely and specifically by this Court.

In other cases since then, decided or approved by this Court and involving multiple taxation of intangibles by the

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[9] *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174 (1932).

[10] *Blackstone v. Miller*, 188 U. S. 189, 23 S. Ct. 277 (1903).

[11] *Newark Fire Insurance Co. v. State Board of Tax Appeals*, 307 U. S. 313, 319, 59 S. Ct. 918 (1939); *Southern Pacific Co. v. McColgan*, 68 Cal App. 2d 48, 156 P.2d 81, 94 (1945); *The Constitution of the United States*, p. 1042, by Legislative Reference Service of the Library of Congress (1953).

[12] 307 U. S. 357, 59 S. Ct. 900 (1939).

[13] 253 U. S. 325, 40 S. Ct. 558 (1920).

domiciliary state and by another state, the taxation of intangibles by the domiciliary state has been limited to—a separate intangible property interest[14]; value of the shares where the laws of the domiciliary state must be resorted to to effect transfer of the shares[15]; and value of intangible property interest of taxpayer resident carrying on activities in respect thereto within the state and receiving, or having available, the benefit, protection and privileges of the state courts and laws.[16] These cases do not support intangible property tax jurisdiction of Pennsylvania in the instant case since the factors or elements upon which domiciliary state tax jurisdiction is based in those cases are absent in the instant case. By their very nature, these decisions, as well as the majority view of this Court in the *Newark Fire Insurance* and *Curry Cases,* in so far as multiple taxation of intangibles is concerned, are relied upon by appellant to strike down, as a violation of Due Process, the state court's ruling upholding the jurisdiction of Pennsylvania to tax in the instant case.

(2) It is the Duty of this Court to Examine the Evidence to Determine the Correctness of Appellant's Conclusions as to the Establishment of Commercial Domicile and Business Situs in Florida where its Assertion of a Federal Right Under Due Process Is Based upon Such Conclusions.

It is not necessary for this Court to consider this issue if it agrees with appellant's first proposition that nothing

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[14] *Curry v. McCanless,* 307 U. S. 357, 59 S. Ct. 900 (1939); *Graves v. Elliott,* 307 U. S. 383, 59 S. Ct. 913 (1939); *Graves v. Schmidlapp,* 315 U. S. 657, 62 S. Ct. 870 (1942); *Com. v. Stewart,* 338 Pa. 9, 12 A.2d 444 (1940); affirmed *Stewart v. Pennsylvania,* 312 U. S. 649, 61 S. Ct. 445.

[15] *State Tax Commission of Utah v. Aldrich,* 316 U. S. 174, 62 S. Ct. 1008 (1942).

[16] *Greenough v. Tax Assessors of Newport,* 331 U. S. 486, 67 S. Ct. 1400 (1949).

supports Pennsylvania's jurisdiction to levy a property tax on appellant's intangible assets under the circumstances in the instant case. If it does not agree, then it must determine the correctness of these conclusions and, if warranted, their effect upon Pennsylvania's power and jurisdiction to tax.[17] In this case, it was said in one of the opinions of this Court at pages 319 and 320:

> "• • • In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, *is the basis for a claim of a federal right,* the duty of inquiring into the evidence which establishes such business situs rests upon this Court." (Emphasis supplied.)

The state courts, in the instant case, disregard this duty (ante, pp. 9, 12), and, therefore, the duty devolves upon this Court as the circumstances may require.

(3) Appellant established a commercial domicile for itself and a business situs for its intangible assets in Florida, thereby subjecting such assets to valid property taxation by that state and ousting domiciliary jurisdiction to levy a property tax on the same incidents of the same assets.

This issue is interrelated with appellant's first proposition that nothing supports jurisdiction of the domiciliary state to levy a property tax on appellant's intangible assets.

"Business situs" rebuts the presumption of the domiciliary situs rule of taxation. It recognizes that the owner may so deal with his intangible personal property as to localize it for property taxation in a jurisdiction other than that of the state of the owner's domicile. Such situs is established by definite evidence that *specific* intangibles have been integrated under local control and management with

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[17] *Newark Fire Insurance Co. v. State Board of Tax Appeals,* 307 U. S. 313, 319, 320, 59 S. Ct. 918.

local activities in a continued course of business.[18] On the basis that business situs has made the notion of a tax situs for particular intangibles more definite, these cases hold that the "business situs" state has power and jurisdiction to levy a proper tax on such intangibles. In the instant case, it is established from appellant's Requests for Findings of Fact, Nos. 1 to 13 inclusive, approved by the lower state court (R. 24a-28a) that *all* of appellant's intangible assets acquired a business situs in Florida, and from the cases cited, that Florida pursuant to its statute, (Florida Statutes Annotated, Vol. 10, Title XIII, Taxation and Finance, §§ 199.01-02-07-11), which has been construed as taxing intangible assets having a taxing or business situs in the state,[19] has imposed a valid property tax on all appellant's intangible assets. It is submitted that property taxation by Pennsylvania of the *same* incidents of the *same* intangible assets on the basis of the domiciliary situs rule of taxation violates Due Process and presents a substantial Federal question.

A corporation of one state is held to establish a "commercial domicile" in another state: when the state of incorporation is a mere paper domicile in which the corporation carries on none of its activities; when it establishes "the actual seat of its corporate government" in the other state by locating there its principal business office where its directors hold their meetings and at and from which its corporate business in that state and in other states is managed, directed, controlled and supervised; and when there, also, contracts are entered into, accounting records are kept,

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[18] *New Orleans v. Stempel*, 175 U. S. 309, 20 S. Ct. 110 (1899); *Liverpool & London & Globe Insurance Co. v. Board of Assessors*, 221 U. S. 346, 31 S. Ct. 550 (1911); *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 56 S. Ct. 773 (1936); *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234, 57 S. Ct. 677 (1937).

[19] *Gay v. Bessemer Properties, Inc.*, 159 Fla. 729, 32 So. 2d 587 (1947).

collections and disbursements are made.[20] Under these circumstances, these cases hold that the state of commercial domicile has jurisdiction to impose an ad valorem property tax on the corporation's intangible assets, including those arising in other states in the absence of proof of "localization" of any of the intangibles in such other states. It has further been held in the *Wheeling Steel Corporation* case at p. 221 that to attribute any of the corporation's intangibles to the paper domiciliary state would "make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering state all the *tangible* possessions of the corporation *without regard to their actual location.*" (Emphasis supplied.)

In the instant case, the facts as found by the lower state court (R. 24a-28a) prove that Pennsylvania is a mere paper domicile of appellant and that appellant has established its commercial domicile in Florida. It is submitted, on the basis of the authorities cited that Florida and not Pennsylvania has jurisdiction to impose property tax on appellant's intangible assets and that property taxation by Pennsylvania of the same incidents of the same intangible assets violates Due Process, thereby presenting a substantial federal question in the instant case.

In the situation, either of business situs or commercial domicile, all of appellant's intangible assets, specifically and definitely as to kind and amount, have acquired a tax situs in Florida to the same degree and extent that its *tangible* property has an actual location and tax situs in Florida, Puerto Rico and the British West Indies. There can be no dispute that property taxation by Pennsylvania of appellant's tangible property would violate Due Process; and it is submitted that no distinction can be made, as to result,

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[20] *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 56 S. Ct. 773 (1936); *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234, 57 S. Ct. 677 (1937); *Smith v. Ajax Pipe Line Co.*, 87 F. 2d 567 (1937); affirmed 300 U. S. 677, 57 S. Ct. 669.

when Pennsylvania imposes property tax on the same incidents of appellant's intangible assets that are subjected to valid property taxation by the State of Florida.

F. CONCLUSION.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal; that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution; and that, if the appeal should be considered as having been improvidently taken, the Court should consider it as a petition for certiorari; and appellant prays that final judgment of the Supreme Court of Pennsylvania be reversed and for such other relief as may be fit and proper.

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APPENDIX A.

TEXT OF PENNSYLANIA STATUTE INVOLVED.

Section 20 of the Act of June 1, 1889, P. L. 420, as Last Amended by the Act of May 16, 1945, P. L. 606, 72 Purdon's Pennsylvania Statutes § 1901.

Section 20. That hereafter, except in the case of corporations of the first class, nonprofit corporations, and cooperative agricultural associations not having capital stock and not conducted for profit, banks, savings institutions, title, insurance, or trust companies, building and loan associations, and foreign insurance companies, it shall be the duty of every corporation having capital stock, every joint-stock association, limited partnership, and every company whatsoever, now or hereafter organized or incorporated by or under any laws of this Commonwealth, and of every corporation, joint-stock association, limited partnership, and company whatsoever, now or hereafter incorporated or organized by or under the law of any other State or Territory of the United States, or by the United States, or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership or joint-stock association, company, or corporation whatsoever, association or associations, copartnership or copartnerships, person or persons, or in any other manner, to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

First. The amount of its capital stock at the close of the year for which report is made, together with the highest

selling price per share, and the average selling price thereof during said year.

Second. Its debt account.

Third. Its income account, together with the disposition of any net income, and its profit and loss statement.

Fourth. Its general balance sheet.

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal, in the manner hereinafter provided, of the capital stock of the said corporation, company, joint-stock association, or limited partnership, at its actual value in cash as it existed at the close of the year for which the report is made.

The affidavit of two of the officers of such corporation, limited partnership, joint-stock association or company, shall be attached to said report. Such affidavit shall be in the form required by the Department of Revenue, but shall state, in addition to any other averments required by the department, that, with fidelity and according to the best of their knowledge and belief, the affiants have estimated, valued and appraised, as shown in said report, the capital stock of the said corporation at its actual value in cash as it existed at the close of the year for which report is made; [not less, however, than] *taking into consideration,* first, the average which said stock sold for during the year; and second, the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends, expended in betterments, or carried into the surplus or sinking fund; and third, the actual value indicated or measured by consideration of the intrinsic value of its tangible property and assets, and of the value

of its good will and franchises and privileges, as indicated by the material results of their exercise, taking also into consideration the amount of its indebtedness.

The time for filing reports may be extended; taxpayers may be permitted to file their reports on a fiscal year basis; the procedure in case the Department of Revenue is not satisfied with the appraisement made by the officers of the taxpayer, and the penalties for failing to file reports and pay taxes shall be as prescribed by law.

* * *

Section 21 of the Act of June 1, 1889, P. L. 420, as Last Amended by the Act of May 29, 1951, P. L. 462, 72 Purdon's Pennsylvania Statutes § 1871.

Section 21. (a) That every domestic corporation other than corporations of the first class, nonprofit [corporation] *corporations*, and cooperative agricultural associations not having capital stock and not conducted for profit, and every joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to, and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said twentieth section: . . . .

(c) * * * : Provided further, That corporations * * * liable to a tax under this section (21) shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them and in which the whole body of stockholders or members, as such, have the entire equitable interest in remainder; * * *.

APPENDIX B.

COPY OF OPINION AND JUDGMENT BELOW.

(As reported in 392 Pa. 323; 141 A.2d 204; headnotes and names of counsel omitted.)

Commonwealth v. Universal Trades, Inc., Appellant.

Argued November 20, 1957. Before JONES, C.J., BELL CHIDSEY, MUSMANNO and JONES, J.J.

Appeal No. 19, May T., 1957 from judgment of Court of Common Pleas of Dauphin County, 1954, Commonwealth Docket, No. 154, in case of Commonwealth of Pennsylvania v. Universal Trades, Inc. Judgment affirmed.

Appeal by taxpayer from determination of capital stock tax by state taxing officials. Before Richards, P.J. and Neely, Sohn and Kreider, J.J.

Adjudication filed finding for plaintiff, defendant's exceptions to adjudication dismissed, and final judgment entered. Defendant appealed.

Opinion by Mr. Justice Bell, March 17, 1958:

The question involved, although differently phrased by appellant and appellee, may be thus stated: May Pennsylvania impose a capital stock tax on a domestic corporation based in part upon intangible assets which are located outside of Pennsylvania and have acquired a commercial or business situs in Florida, without violating the Due Process Clause of the Constitution?

This is a test case. Judge RICHARDS, President Judge of the Orphans' Court of Dauphin County, sitting in the Court of Common Pleas of Dauphin County, in a very able opinion said, inter alia:

"The facts are not in dispute. Most of them are contained in a stipulation filed. They may be summarized as follows:

"The defendant is a Pennsylvania corporation with a registered office in Ambridge, Penna., and a principal office in Florida. Within its charter purposes, it has been engaged exclusively in construction work in the British West Indies and Puerto Rico for the United States Navy and United States Department of Engineers. All of its contracts have been negotiated and effected by its officers working out of the Florida office. The defendant exercises complete jurisdiction, control, supervision and management of its assets and business at its Florida office. All stockholders' and directors' meetings are held there. All books of account and records are maintained there. All investments are made, controlled and supervised there. All invoices for work done or services rendered are sent out from, and all receipts therefrom, are collected by the Florida office and deposited in Florida. All disbursements are made either by the Florida office or at the situs of the construction work outside the continental limits of the United States. All executive and administrative functions are performed by its officers at and from its Florida office. The defendant has never negotiated a contract in Pennsylvania; has never negotiated a contract with a resident of Pennsylvania; has never received funds for construction work from a resident of Pennsylvania; nor has the company ever performed a construction contract in Pennsylvania or in the United States. All tangible assets of the company, exclusive of office furniture, are located outside the continental limits of the United States. The office furniture is located at its office in Florida. The tangible assets outside the continental limits of the United States consist of heavy machinery and equipment. The company keeps no inventory in Pennsylvania and employs no salesmen here or elsewhere. The defendant conducts its executive and administrative offices in Florida and performs all other necessary functions to carry on its business there, with the exception of the actual construction work which is done outside the continental limits of the United States. This work consists of

painting, repairing and making various installations on ships belonging to the Government of the United States.

"During the year in question the company owned tangible property consisting of machinery, equipment, fixtures and work in progress having a net book value of $266,614.26. The company owned intangible assets having a net book value of $271,052.92 consisting of cash in bank of $98,527.36, accounts receivable of $156,054.17, advances to individuals of $11,238.39, and special deposits of $5,233.00.

"During the year here involved the defendant filed with the State of Florida a Corporation Intangible Tax Report upon which it paid said tax on cash on hand and in banks, and on accounts receivable.

"The Pennsylvania capital stock tax here involved was determined by applying a property allocation fraction of $271,052.92/$537,667.18 x $266,000.00 = $134,090.00, taxable at five mills, or a tax of $670.45. The numerator is the value of the intangible assets heretofore mentioned, while the denominator is the value of the total assets. The $266,000 is the value of the capital stock."

The case of *Commonwealth v. Semet-Solvay Co.*, 262 Pa. 234, 105 A. 92, is on its facts analogous to and in principle rules the instant case. In that case, Pennsylvania imposed a capital stock tax upon a domestic corporation which was engaged in business in Pennsylvania and in other states. The Court held that *deposits in other states in connection with business done therein and accounts and bills receivable from the operations in other states were taxable in Pennsylvania.* Judge KUNKEL, whose opinion was affirmed Per Curiam by this Court said, inter alia, (pages 235-236):

"Capital stock represented by tangible personal property located permanently outside of the state is not taxable here, but this is not so, touching intangible personal property. Whatever may be the law of the other states it is the law of this state that *the situs of such property for taxation is the domicile of the owner.* The fact that the bank deposits

in the present instance were in the banks of the other states and were there used in connection with the defendant's business and operations, or that the accounts receivable were derived from services performed and goods sold and payable outside of this state did not change their situs for taxation. Whether taxable directly or through the capital stock, *their taxable situs was the domicile of the defendant regardless of their source or place of use;* Commonwealth v. Standard Oil Co., 101 Pa. 119; Commonwealth v. Buffalo & Lake Erie Traction Co., 233 Pa. 79; Commonwealth v. Curtis Pub. Co., 237 Pa. 333, and cases there cited. And this doctrine violates no provision of the Federal Constitution: Kirtland v. Hotchkiss, 100 U. S. 491; Fidelity & Columbia Trust Company v. Louisville, 245 U. S. 54."

This has always been the settled law of Pennsylvania. In *Commonwealth v. Penna. Coal Co.*, 197 Pa. 551, 47 A. 740, the Court held that intangibles—in that case a mortgage held by a Pennsylvania corporation secured on foreign real estate—have as their situs the domicile of the owner, and are properly taxable in Pennsylvania.

In *Commonwealth v. Stewart*, 338 Pa. 9, 12 A. 444, affirmed in *Stewart v. Pennsylvania*, 312 U. S. 649, the Court sustained the taxation (under the Pennsylvania Personal Property Tax Act) of the equitable interest of a cestui que trust who resided in Pennsylvania in the out of state intangibles located in New York under a New York trust. This Court said (page 17):

"It is urged by appellee that the trust funds have their situs in New York, are taxable there in the possession of the trustee, and are beyond the jurisdictional taxing power of the State of Pennsylvania. This argument loses sight of principles of constitutional law which in our opinion are firmly established, namely, that the existence of different forms of ownership interests in intangible personal property may make such intangibles amenable to taxation by more than one sovereignty, and that 'double taxation', that is taxation of such different ownerships in the same property, even

though in part overlapping, is not in itself a violation of the due process clause of the Fourteenth Amendment. In the present instance the State of Pennsylvania is not levying a tax upon the same subject of taxation as the State of New York might do, but only upon the equitable, interest of appellee in the intangibles of which the legal ownership is in the trustees. While the doctrine of mobilia sequuntur personam no longer applies to tangibles, these, like land, having their tax situs in the jurisdiction in which they are physically located (Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; Frick v. Pennsylvania, 268 U. S. 473; Curry v. McCanless, 307 U. S. 357, 363, 364, 365), in the case of intangibles the ancient doctrine still remains, because of obvious differences, theoretical and practical, between them and tangible chattels; Union Refrigerator Transit Co. v. Kentucky, supra, 205; Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58, 59; Frick v. Pennsylvania, supra, 494; Blodgett v. Silberman, 277 U. S. 1, 9, 10, 17; Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204; Curry v. McCanless, supra, 365, 366, 367. By virtue of that doctrine the situs of the equitable interest of appellee in the trust intangibles is that of her domicile; her estate therein is property in Pennsylvania and therefore subject to the taxing jurisdiction of this state. The right of Pennsylvania to tax property which, in the view of the law, is within its jurisdiction, cannot be denied or impaired because another state also may have the right to tax one of its own residents who enjoys another kind of ownership in the funds constituting the trust res."

In *Commonwealth v. The Mundy Corporation,* 346 Pa. 482, 30 A. 2d 878, the Court said (page 484):

"The Act of 1935, P. L. 184, amending the Act of 1889, P. L. 420, does not give power to the Commonwealth to levy a capital stock tax or a franchise tax upon securities held and owned by a *foreign* corporation doing business in Pennsylvania, which have no fair relation to the value of the franchise enjoyed by the corporation in this state. Such

assets must be excluded. See Commonwealth v. Columbia Gas and Electric Corporation, 336 Pa. 209, 8 A. 2d 404. These securities which the Commonwealth is attempting to tax are incorporeal intangibles and as such under the facts here present are not within the taxing jurisdiction of the state. The legal situs of this property for taxation purposes is the state of appellee's domicile, to wit, Delaware. A corporation's domicile is the state of its incorporation: Bank of Augusta v. Earle, 38 U. S. 519, 588, and that is the situs for taxation of its money in bank and bonds or other securities, in safe keeping in that state: . . ."

Similarly, in *Commonwealth v. Buffalo & Lake Erie Traction Co.*, 233 Pa. 79, 81 A. 932, Judge KUNKEL, whose opinion was affirmed Per Curiam by this Court, said (page 82): "The fact that the bonds were physically out of the State cannot affect the question of their taxability. The owners were domiciled in this State and the bonds had their situs here also. . ."

In *Sauer Appeal*, 167 Pa. Superior Ct. 33, 74 A. 2d 700, the Court said (page 36): "Although having no direct bearing on the present question, under the principle of Mobilia Sequuntur Personam, the situs of intangible personal property for tax purposes is the domicile of the owner. Com. v. Curtis Publishing Co., 237 Pa. 333, 85 A. 360; Com. v. Semet-Solvay Co., 262 Pa. 234, 236, 105 A. 92; Dorrance's Estate, 333 Pa. 162, 168, 3 A. 2d 682; Com. v. Stewart, 338 Pa. 9, 18, 12 A. 2d 444, affirmed 312 U. S. 649, 61 S. Ct. 445, 85 L. Ed. 1101."

Notwithstanding all the cases hereinabove cited and quoted, appellant contends that the fact that certain intangibles have acquired a commercial or business situs—which it equates to domicile—in Florida, and that a Florida (corporation intangible) tax has been paid thereon, (1) negates and nullifies the power of Pennsylvania (which it terms merely a paper domicile) to impose a capital stock tax based in part on such intangibles, and (2) that to permit Pennsylvania to impose a tax under such circumstances

would amount to a denial of due process which is guaranteed by the Fourteenth Amendment to the Constitution of the United States. We shall assume, arguendo, what the Commonwealth vigorously denies, viz. that appellant has established a commercial and business situs for its intangible assets in Florida.

We agree that the capital stock tax is not a franchise tax but a property tax: *Murray v. Philadelphia,* 364 Pa. 157, 166, 71 A. 2d 280, 284; *National Biscuit Company v. Philadelphia,* 374 Pa. 604, 612, 71 A. 2d 280; *Commonwealth v. Standard Oil Co.,* 101 Pa. 119, 145; *Peoples Natural Gas Co. v. Pittsburgh,* 317 Pa. 1, 7, 175 A. 691; *Philadelphia v. Samuels,* 338 Pa. 321, 325, 12 A. 2d 79; *Lawrence Township School District Tax Case,* 362 Pa. 377, 381, 67 A. 2d 372; *Commonwealth v. Penna. Coal Co.,* 197 Pa., supra; *Commonwealth v. Mundy Corporation,* 346 Pa., supra. But that will not suffice to defeat the present tax. Pennsylvania gives this domestic corporation its existence, its very life. It defines its powers; it gives it the right to make contracts, to sue and be sued, to increase or decrease its capital; it requires it to maintain a registered office in Pennsylvania where it must keep, inter alia, an original or duplicate record of the proceedings of the shareholders and of the directors, and the original or a copy of its by-laws.* Pennsylvania statutory and decisional law define the nature and extent, and protect the interest of its shareholders. Why, under these facts, should Pennsylvania lose or abandon its right to impose an annual capital stock tax based in part upon the intangible property here involved!

Appellant concedes that the following taxes would not violate due process, even if a property tax is assessed by Florida upon appellant's intangible assets which have a commercial domicile or business situs in Florida ". . . A property tax on an equitable interest in property held and

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* Act of May 5, 1933, P. L. 364, Art. III § 508, 15 PS § 2852-308.

enjoyed by appellant within the state, Com. v. Stewart, 338 Pa. 9, 17, 21, . . . affirmed 312 U. S. 649; . . . a tax on all of its shares as a condition to its existence, Corry v. City of Baltimore, 196 U. S. 466, 477, . . . even though the shares may be taxed also by the state in which the owner resides, Hawley v. City of Malden, 232 U. S. 1, 11, 12 . . .; an excise tax on the receipt of income, if appellant were physically present within the state, even though earned in and taxed by, another state, Lawrence v. State Tax Commission, 286 U. S. 276, 281 [as well as] a franchise tax for the privilege 'to be' a corporation measured by its entire capital stock regardless of whether it was doing business outside of the state, Kansas City, Memphis & Birmingham R.R. Co. v. Stiles, 242 U. S. 111, 119 . . .; [and] a transfer inheritance tax on the transfer of its shares because Pennsylvania laws created the shares and protected the property rights therein and are essential to the transfer even though the state of the domicile of decedent could levy a transfer inheritance tax thereon, State Tax Commission of Utah v. Aldrich, 316 U. S. 174."

Notwithstanding all the aforesaid cases appellant contends that Pennsylvania is unjustly subjecting it to double taxation and is thereby violating due process.

Pertinent United States Supreme Court authorities reaffirm our conviction that the Capital Stock Tax was validly imposed upon the appellant: *Cream of Wheat Co. v. Grand Forks,* 253 U. S. 325; *Fidelity & Columbia Trust Co. v. Louisville,* 245 U. S. 54; *Newark Fire Insurance Co. v. State Board,* 307 U. S. 313; *Greenough v. Tax Assessors,* 331 U. S. 486; *State Tax Commission of Utah v. Aldrich,* 316 U. S. 174.

Cream of Wheat Co. v. Grand Forks, 253 U. S., supra, is particularly apposite and directly governs the instant appeal. In that case, the Cream of Wheat Company was incorporated under the laws of North Dakota, and it maintained a public office therein. However, its manufacturing,

commercial and financial business were conducted wholly outside the state, and the corporation had neither tangible nor intangible property in North Dakota. All of its property was alleged to have been taxed by other states. Nevertheless, the United States Supreme Court sustained a North Dakota tax on the property, including stocks and bonds, of the domestic corporation which were located outside North Dakota, irrespective of whether the North Dakota tax was considered a franchise or a property tax. The Court stated, inter alia, that the Fourteenth Amendment did not prevent double taxation under these circumstances, and pertinently said (pages 328-329):

"The company was confessedly domiciled in North Dakota; for it was incorporated under the laws of that State. As said by Mr. Chief Justice Taney, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' Bank of Augusta v. Earle, 13 Pet. 519, 588. *The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile.* The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent situs beyond its boundaries. This is the ground on which the ferry franchise involved in Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385 (an incorporeal hereditament partaking of the nature of real property) and the tangible personal property permanently outside the State involved in Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania, 198 U. S. 341, and Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, were held immune from taxation by the States in which the companies were incorporated. The limitation upon the power of taxation does not apply even to tangible personal property without the State of the corporation's domicile if, like a seagoing vessel, the property has no permanent situs anywhere. Southern Pacific Co. v. Kentucky, 222 U. S. 63, 68. *Nor has it any application to in-*

tangible property, Union Refrigerator Transit Co. v. Kentucky, supra, p. 205; Hawley v. Malden, 232 U. S. 1, 11, *even though the property is also taxable in another State by virtue of having acquired a 'business situs' there,* Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 59. As stated in that case: 'It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. Flint v. Stone Tracy Co., 220 U. S. 107, 146, 162 et seq. Whichever this tax technically may be, the authorities show that it must be sustained.' "

In *Fidelity & Columbia Trust Co. v. Louisville,* 245 U. S., supra, a person domiciled in Kentucky carried on a business in Missouri and made deposits in the latter state which were derived from the business carried on therein. The resulting credits were included by Kentucky authorities in assessing his personal property taxes in Kentucky. On these facts, the Court held that the tax, whether considered as a tax on property or a tax on the individual measured by his property, was within the power of the State of Kentucky, conceding, arguendo, that Missouri also had power to tax the deposits.

Newark Fire Insurance Co. v. State Board, 307 U. S., supra, is also pertinent to the instant appeal. In that case, a tax assessed under a New Jersey statute, upon an Insurance Company incorporated under the laws of New Jersey, upon the full amount of its capital stock paid in and accumulated surplus, less certain deductions for liabilities and statutory exemptions, was resisted by the corporation as being a violation of the Fourteenth Amendment on the ground that the business situs of its intangibles and the tax domicile of the corporation were in New York. The Fire Insurance Company had a registered office which it maintained in Newark, N. J., together with such books as are required to be kept within that State. Except for some minor local business carried on in its Newark office, the corporation operated from its New York office. No

executive officer was in New Jersey; reports were sent to the New York office; the general accounts of the corporation were kept in the New York office; the general accounting, underwriting and executive officers were located in New York; all cash and securities were located in New York or outside of New Jersey with the exception of $6,425.; all of the corporation's general affairs were conducted from the main office in New York and had been so conducted from the time the corporation had moved its main office from Newark six years previously. In sustaining the tax, two opinions were filed by the Court. The first was written by Justice REED in which three additional Justices concurred; the second opinion was written by Justice FRANKFURTER in which three additional Justices concurred. One Justice (MCREYNOLDS) dissented. In the opinion of Justice REED the following appears (page 318):

"When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the jurisdiction, of its creator. There it must dwell. The dominion of the state over its creature is complete. In accordance with the ordinary recognition of the rule of mobilia sequuntur personam to determine the taxable situs of intangible personality, the presumption is that such property is taxable by the state of the corporation's origin."

Justice FRANKFURTER said (page 324):

"Chapter 236 of the New Jersey Laws of 1918, as applied to the circumstances of these two cases, clearly does not offend the Constitution. In substance, such legislation has heretofore been found free from constitutional infirmity. Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, affirming 41 N. Dak. 330; 170 N. W. 863. During all the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered since that case was decided, the extent of a state's taxing power over a corporation of its own creation, recognized in the Cream of Wheat case, has neither been restricted nor impaired."

In *Greenough v. Tax Assessors*, 331 U. S. supra, a Rhode Island municipality assessed a tax against a resident of Rhode Island for one-half of the value of intangibles held jointly by him and a resident of New York as trustees under the will of a resident of New York. The evidences of the intangible property were at all times in New York, and the life beneficiary of the trust resided there. The Rhode Island resident did not actually exercise his powers as trustee in Rhode Island. The appellant-trustee contended in that case that the Rhode Island tax statute if applicable to him was unconstitutional under the Due Process Clause of the Fourteenth Amendment, since (1) the tax would be imposed simply by virtue of the trustee's residence in Rhode Island, and (2) because it exacts payment measured by the value of property wholly beyond the reach of Rhode Island's power and to which Rhode Island gives no protection or benefit. In holding that the tax did not violate the Due Process Clause of the Fourteenth Amendment, the Court said (page 492):

". . . So long as a state chooses to tax the value of intangibles as a part of a taxpayer's wealth, the location of the evidences of ownership is immaterial. If the location of the documents was controlling, their transfer to another jurisdiction would defeat the tax of the domiciliary state. As a matter of fact, there is more reason for the domiciliary state of the owner of the intangibles than for any other taxing jurisdiction to collect a property tax on the intangibles. Since the intangibles themselves have no real situs, the domicile of the owner is the nearest approximation, although other taxing jurisdictions may also have power to tax the same intangibles. Normally, the intangibles are subject to the immediate control of the owner. This close relationship between the intangibles and the owner furnishes an adequate basis for the tax on the owner by the state of his residence as against any attack for violation of the Fourteenth Amendment. The state of the owner's residence supplies the owner with the benefits and

protection inherent in the existence of an organized government. He may choose to expand his activities beyond its borders but the state of his residence is his base of operations. It is the place where he exercises certain privileges of citizenship and enjoys the protection of his domiciliary government."

State Commission of Utah v. Aldrich, 316 U. S. 174, is applicable to and in principle rules the instant case adversely to appellant. That case is well summarized in the syllabus (page 174):

"A State may, consistently with the Fourteenth Amendment, impose a tax upon a transfer by death of shares of stock in a corporation which is incorporated under its laws, even though the decedent of whose estate the shares were a part, was domiciled at the time of death in another State, where the certificates representing the shares were held; though the certificates were never within the state of incorporation; and though for many years the corporation had kept its stock books, records and transfer agents in the State where decedent was domiciled, and had maintained none of these in the State of incorporation."

The Court in its opinion said, inter alia, (page 178):

". . . We held that the power to tax intangibles was not restricted to one State, whether 'we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice MARSHALL in McCulloch v. Maryland, supra, through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both.' Id. pp. 367-368. And we added: *'Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls;* . . . . . Protection, benefit, and power over the subject matter are not confined to either state.' Id., p. 368.

". . .

"More specifically, if the question is 'whether the state has given anything for which it can ask return' (Wisconsin v. J. C. Penney Co., supra, p. 444), or whether the transfer depends upon and involves the law of Utah for its exercise (Blackstone v. Miller), there can be no doubt that Utah is not restrained by the Fourteenth Amendment from taxing this transfer. The corporation owes its existence to Utah. Utah law defines the nature and extent of the interest of the shareholders in the corporation. Utah law affords protection for those rights. Utah has power over the transfer by the corporation of its shares of stock. Certainly that protection, benefit and power over the shares would have satisfied the test of Blackstone v. Miller and Curry v. McCanless. . . ."

". . .

". . . In line with our recent decisions in Curry v. McCanless, Graves v. Elliott and Graves v. Schmidlapp, we repeat that *there is no constitutional rule of immunity from taxation of intangibles by more than one State.* In case of shares of stock, 'jurisdiction to tax' is not restricted to the domiciliary State. Another State which has extended benefits or protection, or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares (Blackstone v. Miller, p. 205), may likewise constitutionally make its exaction. In other words, we restore these intangibles to the constitutional status which they occupied up to a few years ago. See Greves v. Shaw, 173 Mass. 205, 53 N. E. 372; Larson v. MacMiller, 56 Utah 84, 189 P. 579, and cases collected in 42 A. L. R. pp. 365 et seq."

Notwithstanding the able argument of counsel for the appellant, we see no reason or justification for overruling the prior decisions of this Court which expressly or in principle are sustained by the above mentioned decisions of the Supreme Court of the United States, and validate the present tax.

Judgment affirmed.

APPENDIX C.

PETITION FOR REARGUMENT AND ORDER ENTERED IN SUPREME COURT OF PENNSYLVANIA, NO. 19, MAY TERM, 1957.

Petition of Appellant for Reargument (Filed March 26, (1958.)

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

The petition of Universal Trades, Inc., appellant in the above case, by its attorneys, Manuel Kraus and Roy J. Keefer, respectfully prays your Honorable Court to grant to it a reargument for the reasons set forth below. The judgment of the lower court was affirmed by this Court on March 17, 1958.

In its opinion, this Court assumes that the appealed tax is based *only "in part* upon intangible assets which are located outside of Pennsylvania and have acquired a commercial or business situs in Florida" and it cites enumerated decisions of the Supreme Court of the United States as supporting the rule of the Pennsylvania decisions which it construes as holding that the taxable situs of appellant's intangible assets is at its Pennsylvania domicile "regardless of their source or place of use."

Appellant's reasons for reargument are that: (1) this Court has misapprehended what is being taxed in the instant case; (2) it erred in holding that the asserted tax does not violate Due Process; (3) it has failed or refused to make findings of fact and conclusions of law as to whether appellant has acquired a commercial domicile and its intangible assets have acquired a business situs in Florida and to understand the legal significance of findings on these points; (4) the decisions of the Supreme Court of the

United States cited by this Court are not authoritative or do not apply to support the Pennsylvania tax; and (5) appropriate decisions of the Supreme Court of the United States, as well as logic and reason, would invalidate the property tax asserted by Pennsylvania as violating Due Process.

I. The property tax asserted by Pennsylvania is based wholly upon the same intangible property of appellant or incidents of such property upon which valid property taxation by Florida has been imposed, and violates Due Process.

A. THE PENNSYLVANIA TAX IS BASED WHOLLY ON APPELLANT'S INTANGIBLE ASSETS.

Although the Court in its opinion agrees that the capital stock tax on Pennsylvania corporations is a property tax (p. 6), it committed error in framing the issue involved by stating that the tax on the capital stock of appellant, a Pennsylvania corporation, is only *"based in part"* upon its intangible assets which are located and have acquired a commercial or business situs in Florida. This statement produces the erroneous inference that the tax on appellant's capital stock is based *also* upon something other than appellant's intangible assets located and having a commercial or business situs in Florida. Such is not in accord with the facts or the law.

Capital stock was settled against appellant as follows (R. 10a, 11a and Commonwealth's Exhibit 1, Appellant's capital stock tax report) inserted at R. 16a):

$$\frac{\text{(a) } 271{,}052.92}{\text{(b) } 537{,}667.18} \times \text{(c) } 266{,}000 = \text{(d) } 134{,}090$$

In this ratio, the symbol (a) represents total assets less tangible property located outside of Pennsylvania and

therefore the numerator represents intangible assets exclusively consisting of accounts receivable, cash on deposit and advances to individuals. The symbol (b) or the denominator represents total assets. The symbol (c) represents the actual value in cash of appellant's *whole* capital stock. The symbol (d) represents *the taxable capital stock value of appellant's intangible assets.*

This tax settlement, based upon the ratio as indicated, is made pursuant to the provisions of the Act of June 22, 1931, P. L. 685, 72 Purdon's Statutes, § 1896. Furthermore, the Pennsylvania courts have held that the dollar amount of the *whole* capital stock value divided by dollar amount of value of *total* assets produces the rate at which each dollar of asset value enters into the capital stock value and that this rate times taxable asset value of exempt asset value produces the amount of taxable capital stock value or the amount of exempt capital stock value.[1] In the instant case, this rate applied to appellant's intangible assets (symbol (a)) produces the taxable capital stock value of $134,090. Therefore, there can be no doubt that the tax imposed by Pennsylvania on appellant's capital stock is based *entirely, wholly,* and *exclusively* upon its intangible assets located and having a commercial or business situs in Florida; and that, under the circumstances, property taxation of these intangibles by Florida meets the requirements of Due Process.[2]

In sustaining the property tax asserted by Pennsylvania on these same intangible assets, this Court did not give due consideration to other taxes which Pennsylvania does, or could, impose on appellant and to the circumstances under which the disputed property tax has been asserted.

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[1] *Com. v. Eastern Securities Co.*, 309 Pa. 44, 52 (1932); *Com. v. Union Shipbuilding Co.*, 271 Pa. 403, 405 (1921); *Com. v. Baxter Kelley & Faust Inc.*, 53 Dauphin 73, 89 (1942).

[2] *Wheeling Steel Corporation v. Fox*, 296 U. S. 193 (1936); *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234 (1937).

B. PENNSYLVANIA HAS EXERCISED, OR COULD EXERCISE, THE POWER TO IMPOSE APPROPRIATE, VALID TAXES ON APPELLANT IN RETURN FOR BEING THE CHARTERING STATE.

Pennsylvania has imposed on appellant the domestic bonus under the Act of April 20, 1927, P. L. 322, as amended (72 Purdon's Statutes, §§ 1821-1826 and the Corporate Net Income Tax under the Act of May 16, 1935, P. L. 208, as amended, 72 Purdon's Statutes, §§ 3420a-3420m.)

The domestic bonus is based upon the amount of authorized capital stock in the Articles of Incorporation and upon subsequent actual increases and has been construed as the sum exacted for the privilege "to be" a corporation, that is, the sum exacted for the granting of a charter and charter privileges.[3]

The Corporate Net Income Tax has been construed as an excise tax imposed on domestic and foreign corporations for the privilege of doing business in Pennsylvania.[4] Settlement against appellant for this tax for the year involved (fiscal year ended June 30, 1953) showed no tax because appellant did not conduct any activities and had no tangible property employed, in Pennsylvania and, therefore, the numerators of the tangible property, wages and gross receipts allocation fractions were zero.

Pennsylvania, under *appropriate* revenue laws and circumstances, could properly assert the power to levy taxes affecting appellant or its franchises as follows: a franchise tax for the privilege "to be" a corporation measured by its entire capital stock regardless of whether it was doing business outside the state;[5] an excise tax on the receipt of in-

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[3] *Com. v. Erie and Western Transportation Co.*, 107 Pa. 112, 115 (1884); *Com. v. Bailey, Banks & Biddle Co.*, 20 Super. Ct. 210, 218 (1902); *Com. v. Provident Life & Trust Co.*, 6 Dauphin 107, 114 (1889).

[4] *Turco, Paint & Varnish Co. v. Kalodner*, 320 Pa. 421 (1936); *Com. v. Warner Bros. Theatres*, 345 Pa. 270 (1942).

[5] *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, 119 (1916).

come, if appellant were physically present within the state, even though earned in and taxed by another state;[6] a property tax on an equitable interest in property held and enjoyed by appellant within the state;[7] a tax on all its shares as a condition to its existence;[8] even though the shares may be taxed also by the state in which the owner resides;[9] and a transfer inheritance tax on the transfer of its share because Pennsylvania laws created the shares and protected the property rights therein and are essential to the transfer even though the state of domicile of the decedent could levy a transfer inheritance tax thereon.[10]

In its opinion at page 7, this Court wholly bases the power and jurisdiction of Pennsylvania to subject appellant's intangible assets to a property tax upon the following reasoning and statements:

> "• • • Pennsylvania gives this domestic corporation its existence, its very life. It defines its powers; it gives it the right to make contracts, to sue and be sued, to increase or decrease its capital; it requires it to maintain a registered office in Pennsylvania where it must keep, inter alia, an original or duplicate record of the proceedings of the shareholders and of the directors, and the original or a copy of its by-laws. Pennsylvania statutory and decisional law define the nature and extent, and protect the interest of its shareholders. Why, under these facts, should Pennsylvania lose or abandon its right to impose an annual capital stock tax based in part upon the intangible property here involved?"

These statements *do not, and cannot,* support Pennsylvania's power and jurisdiction to levy a property tax upon appellant's intangible assets. They relate to appellant's

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[6] *Lawrence v. State Tax Commission,* 286 U. S. 276, 281 (1932).

[7] *Com. v. Stewart,* 338 Pa. 9, 17, 21 (1940); affirmed 312 U. S. 649.

[8] *Corry v. City of Baltimore,* 196 U. S. 466, 477 (1905).

[9] *Hawley v. City of Malden,* 232, U. S. 1, 11, 12 (1914).

[10] *State Tax Commission of Utah v. Aldrich,* 316 U. S. 174 (1942).

primary franchise "to be" a corporation and to the granting of charter privileges for which appellant has paid the domestic bonus exaction; or to internal corporate management; or to a tax on shares as a condition of its existence or to a transfer inheritance tax for the privilege of transferring shares—which is or would be valid as indicated heretofore.

Pennsylvania's power and jurisdiction to tax appellant's intangible assets must be based upon "protection, opportunities and benefits" afforded by Pennsylvania laws to the property sought to be taxed.[11] None of these are afforded by Pennsylvania because appellant's intangible property rights are created, enjoyed, protected, enforced and disposed of under the laws of Florida, the British West Indies and Puerto Rico. Furthermore, dominion of Pennsylvania over appellant at least for property tax purposes, has been ousted or removed by the establishment by appellant of a commercial domicile in Florida.[12]

C. Pennsylvania's power and jurisdiction to levy a property tax on appellant's intangible assets are without foundation and, therefore, such tax violates Due Process.

A summary discussion of domicile, mobilia sequuntur personam or domiciliary situs, business situs, paper domicile and commercial domicile will show that this Court erred in sustaining power and jurisdiction of Pennsylvania to tax in the instant case.

1. Domicile.

The state in which a corporation is incorporated or organized is its domicile.

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[11] *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940); *Standard Oil Co. v. Peck*, 342 U. S. 382, 385 (1952).

[12] *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 211 (1936).

2. Domiciliary Situs.

In early times, the maxim "mobilia sequuntur personam" or domiciliary situs developed in respect to taxation when valuables other than land accompanied the owner on his travels. Secrecy of ownership of intangibles was explained as justification for its use, otherwise intangibles would escape taxation entirely. In the early days, also of corporate business, the corporation carried on its business *in the state of* incorporation and generally had its principal place of business there which led the courts to adopt the mobilia rule as to the taxation of intangibles. In such a case, *the corporation benefited from the functions of government in respect to its activities generally and in relation to its intangibles more in that state than in any other.* The idea of benefits provided by the domiciliary state should be noted.

This maxim yielded to the law of situs in case of tangible property.[13]

3. Business Situs.

As the result of greatly expanding business—corporate and individual—extending beyond the state borders of the owner's domicile and becoming multi-state (including the domiciliary state), nation or world-wide, the doctrine of business situs developed as an exception to, or modification of, the mobilia rule. This doctrine gave effect to the realities of the situation and made "the notion of a tax situs for particular intangibles more definite."[14] It recognized that the owner may so deal with his intangible personal property *as to localize* it for property taxation in a jurisdiction other than the state of the owner's domicile. The circumstances which produce this result are: (a)

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[13] *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania,* 198 U. S. 341 (1905).

[14] *Newark Fire Insurance Co. v. State Board,* 307 U. S. 313, 321 (1939).

definite evidence that *specific* intangibles have been integrated with local activities in a continued course of business; (b) elements of local control and management and (c) substantial use and value of the intangible property rights attach to and become a part of, the outside business in such a way that, while the non-resident may own the business, the business controls and utilizes the intangible property rights in its own operation and maintenance.[15] In these cases, it was held that the intangibles were so tied in with the activities of the owner in the foreign state and with the protection of the law and government provided by the foreign state that they had acquired a business situs there and that the foreign state had *jurisdiction* to subject such intangibles to property taxation. And this was so even though the owner was conducting business in the domiciliary state also.

4. Paper and Commercial Domicile.

One of the extensions of the business situs rule, or perhaps an *independent* exception to the mobilia rule, is the development of the commercial domicile theory. The circumstances which give rise to, or create, a commercial domicile are these: the state of incorporation is a mere paper domicile in which the corporation carries on none of its activities; it establishes "the actual seat of its corporate government" in another state by locating there its principal business office where its directors hold their meetings and at and from which its corporate business in that state and other states is managed, directed, controlled and supervised (like the domiciliary state with the principal business office in that state); and there, also, contracts are entered into, accounting records are kept, collections and disbursements are made.

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[15] *New Orleans v. Stempel*, 175 U. S. 309 (1899); *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234 (1937); *Smith v. Ajax Pipe Line Co.*, 87 P. 2d 567 (1937), aff'd 300 U. S. 677.

Under these circumstances, the courts have held that the state of commercial domicile *has jurisdiction* to impose an ad valorem property tax on the corporation's intangible assets, including those arising in other states in the absence of proof of "localization" of any of the intangibles in such other states.[16]

In the *Wheeling* case the court held that, pursuant to the laws of the State of Delaware, the chartering state, the designation of its "principal" office as being in that state and the maintenance of duplicate stock ledger and records of stock transations there, were technical and unimportant because the business operations were actually conducted outside that state; and, in upholding the property tax by the commercial domicile on *all* the intangible assets, it said at page 211:

> "• • • To attribute to Delaware, *merely as the chartering State*, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State all the *tangible* possession of the Corporation *without regard to their actual location.*" (Emphasis supplied).

In other words, the Court is saying, in the case of a paper domicile, that the chartering state has no more power to tax the intangibles of a corporation having established a commercial domicile in another state than it has to tax tangible property having an actual location in another state; and that property taxation of the intangible assets by the chartering state under such circumstances would

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[16] *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 211 (1936); *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234 (1937); *Southern Pacific Co. v. McColgan*, 68 Cal. App. 2d 48, 156 P. 2d 81 (1945); *Smith v. Ajax Pipe Line Co.*, 87 P. 2d 567 (1937) affirmed 300 U. S. 677.

violate Due Process. The logic and reasoning of the business situs cases and of the other commercial domicile cases (which have been cited) hold to the same effect.

In the instant case, Pennsylvania is the paper domicile and Florida is the state of commercial domicile and business situs. As such, Florida has power and jurisdiction to tax appellant's intangible assets. Pennsylvania, not having *actual* dominion over appellant and not having afforded any opportunities, protection and benefits to appellant's intangible assets, lacks power and jurisdiction to subject the same intangible assets to property taxation; and, therefore, the ruling of this Court that the Pennsylvania tax does not violate Due Process is in error.

II. This Court erred in failing or refusing to make findings of fact and conclusions of law or in not ruling that the lower court erred in failing or refusing to make findings of fact and conclusions of law, as to whether appellant had established a commercial domicile and its intangible assets had acquired a business situs, in Florida.

In its Brief to this Court, pages 20-22 and 40, appellant directed this Court's attention to the failure and refusal of the lower court to make findings on commercial domicile and business situs and requested this Court to make appropriate findings based on the Record and it did not do so but assumed, exguendo only (Page 6 of its opinion) that appellant has established a commercial and business situs for its intangible assets in Florida.

In its Brief and Argument, appellant asserted a federal right under Due Process. It contended that it had established a commercial domicile and its intangible assets had acquired a business and tax situs, in Florida, which gave that state power and jurisdiction to levy a valid property tax on its intangibles as that state had done; and that property taxation of the same intangibles by Pennsylvania on the bare basis that it is the chartering state violated Due Process.

A summary of the Record in its Brief, pages 20-22, shows clearly that appellant had established a commercial domicile and its intangible assets had acquired a business situs, in Florida. This Court must make affirmative or negative findings on these points, otherwise there has been no judicial determination of the federal right asserted by appellant.

It is not sufficient for this Court to rule, as it did, that the mobilia rule supports the Pennsylvania tax without violating Due Process. In *Newark Fire Insurance Co. v. State Board,* 307 U. S. 313, the Court said at pages 319 and 320:

> "Insofar as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, *is the basis for a claim of a federal right,* the duty of inquiring into the evidence which establishes business situs rests upon the Court." (Emphasis supplied).

This Court has the same duty which it has failed to perform, and, therefore, it has not adjudicated the federal right asserted by appellant.

III. The decisions of the Supreme Court of the United States relied upon by this Court, are not authoritative, or do not apply, to support the Pennsylvania tax.

The Pennsylvania decisions relied upon by this Court are not controlling in the adjudication of a federal right asserted under the Due Process provisions of the Fourteenth Amendment to the Constitution of the United States. In any event, *Com. v. Stewart,* 338 Pa. 9, involving a seperate equitable interest held and enjoyed by an individual resident of Pennsylvania in trust property having a legal situs outside of Pennsylvania, and *Com v. Munday Corporation,* 346 Pa. 482, involving presumption of domiciliary situs in absence of proof of business situs in Pennsylvania, are not applicable.

In *Newark Fire Insurance Co. v. State Board*, 307 U. S. 313 and in *Curry v. McCanless*, 307 U. S. 357, the case of *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, was not considered by a majority of the Court as having established a settled rule that property taxation of intangibles also by the domiciliary state did not violate due process even though the intangibles were subject to valid property taxation by the business situs state (See appellant's Brief, page 26). The same comment applies to *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54.

The Court quotes from the two opinions in the *Newark Fire Insurance Company* case as supporting the Pennsylvania tax. From Mr. Justice REED's opinion, concurred in by the three other justices the following excerpt is quoted from page 318:

> "• • • In accordance with the *ordinary* recognition of the rule of mobilia sequuntur personam to determine the taxable situs of intangible personality, the presumption is that such property is taxable by the state of the corporation's origin." (Emphsis supplied).

However, later on in this opinion (page 321), it is stated that:

> "• • • To overcome the presumption of domiciliary location, the proof of business situs must, definitely connect the intangibles as an integral part of the local activity."

The entire reasoning of Mr. Justice REED's opinion is that if business situs had been established that would have prevailed and would have overcome the presumption of domiciliary situs.

Mr. Justice FRANKFURTER's opinion in the *Newark* case, concurred in by three justices, relied upon the *Cream of Wheat* case. We have indicated heretofore that the majority of the Court in both the *Newark Fire Insurance Company* case and in the *Curry v. McCanless* case did not con-

sider that the *Cream of Wheat* case had established a settled rule of law.

Therefore, insofar as the *Newark Fire Insurance Company* case is applicable in the instant case it would invalidate and would not sustain the Pennsylvania tax.

The case of *Greenough v. Tax Assessors*, 331 U. S. 486, cited by this Court to support the Pennsylvania tax, involved an assessment of a property tax against a resident of Rhode Island on one-half of the value of intangibles held jointly by him and by a resident of New York as trustees under the will of a resident of New York. The basis of the decision was that the Rhode Island trustee based his operations from his residence in Rhode Island and enjoyed benefits and protection from the laws and government of Rhode Island. In the instant case, appellant never conducted any business in Pennsylvania and, therefore, did not base its operations in this state. It actually removed from the dominion of Pennsylvania by establishing its commerical domicile in Florida. Therefore, the *Greenough* case is not applicable.

The case of *State Commission of Utah v. Aldrich*, 316 U. S. 174, involved a transfer inheritance tax imposed by Utah, the domiciliary state, for the privilege of transferring property rights to shares of stock in the Utah corporation upon the death of the owner. The basis of the decision was that the "transfer depends upon and involves the law of Utah for its exercise" and, therefore, this constituted a separate attribute of property as in the case of *Curry v. McCanless.*

In the instant case there is no separate attribute of the intangible property in Pennsylvania. The laws of Pennsylvania are not resorted to in order to create, enjoy, protect and dispose of appellant's intangible property, and, therefore, the *Aldrich* case is not applicable.

This Court emphasizes three cases referred to in the *Greenough* opinion, to wit, *Curry v. McCanless, Graves v.*

Elliott and *Graves v. Schmidlapp*, as holding that "there is no constitutional rule of immunity from taxation of intangibles by more than one state."

In each of these three cases, however, the tax was imposed by the domiciliary state upon a separate interest in property held and enjoyed by a resident of the domiciliary state in trust property which had a legal situs in another state. This is not the situation in the instant case and, therefore, these cases are not applicable.

Since the decisions of the Supreme Court of the United States in the *Newark Fire Insurance Company* case and in the *Curry v. McCanless* case, in which the majority of the Court in each case refused to apply *Cream of Wheat Co. v. Grand Forks*, we know of no case in which that Court has followed the discredited rule of the *Cream of Wheat* case to sustain, under similar circumstances, any such property tax as that asserted by Pennsylvania in the instant case.

IV. The Commerical Domicile and Business Situs Cases cited in Section I of this petition and their logic and reason would invalidate the Pennsylvania tax in the instant case as violating due process.

This Court must not allow fiction to dominate realities. The limitations of the mobilia rule must be recognized. That rule presumes that all intangible property is taxable at the domiciliary situs but this presumption is overcome by proof and evidence that certain specific definite intangibles have acquired a business situs elsewhere or that the owner has established commercial domicile elsewhere. Proof of business situs requires identification and determination of the amount of specific intangibles which have become integrated in the local business in the business situs state. This negatives the concept of secrecy and avoidance of tax in respect to intangibles which are the basis of the mobilia rule. Logic and reason compel the conclusion that "a fictitious situs can be operative only so long as the property

does not have an actual situs, and becomes ineffective the minute the property acquires a locality and is subject to taxation in that state." 79 A. L. R. 346.

Either valid property taxation by the business situs or commerical domicile state should emancipate the property from property taxation by the domiciliary state on the same property incidents or the judicial constructions upon which the principles of business situs and commercial domicile are founded, should be abolished. This is particularly true where the domiciliary state, as in the instant case, seeks to tax the same intangible property or the same incidents thereof as are subject to valid property taxation by the state of commercial democile and business situs.

In the instant case, Pennsylvania is not taxing intangible property or separate interest in intangible property which has not been subjected to valid property taxation by Florida, the state of commercial and business situs, and, therefore, the Pennsylvania property tax violates due process.

V. Conclusions.

For the reasons stated above, it is respectfully requested that this Court grant reargument to appellant in the instant case. Attached hereto is a copy of the Court opinion filed in this case on March 17, 1958.

Order Entered on Petition for Reargument.

5/23/58: Petition dismissed.

PER CURIAM.